

**ORIGINAL**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION**

04 MAY 24 PM 4:15

U.S. DISTRICT COURT  
N.D. OF ALABAMA

UNITED STATES OF AMERICA,

UNDER SEAL

v.

RICHARD M. SCRUSHY,

Case No. CR-03-BE-0530-

Defendant.

U.S. DISTRICT COURT  
N.D. OF ALABAMA

04 JUN -3 PM 4:40

FILED

**OBJECTION TO AND APPEAL FROM MAGISTRATE JUDGE PUTNAM'S ORDER  
OF MAY 12, 2004 DENYING MODIFICATION OF TRAVEL RESTRICTIONS**

Pursuant to 18 U.S.C. § 3145, United States v. Brown, 342 F.3d 1245, 1246 (11<sup>th</sup> Cir. 2003)(appeals from a magistrate judge must first be made to the district court), citing, United States v. Renfro, 620 F.2d 497, 500 (5<sup>th</sup> Cir. 1980), Defendant Richard M. Scrushy (the "Defendant" or "Mr. Scrushy") respectfully objects to and appeals from the May 12, 2004 ruling (the "Order") of the Honorable T. Michael Putnam ("Magistrate Judge Putnam") denying Defendant's motion to modify his conditions of release pending trial so as to allow the Defendant to travel more freely to Mobile and Baldwin Counties.<sup>1</sup>

**BACKGROUND**

Mr. Scrushy does not lightly ask this Court to devote additional time to this case which is already time consuming enough. However, the absolute merit of his modest request to the Magistrate Judge coupled with the lack of any real response by the government or any reasoned decision by the court below compels this objection and appeal.

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<sup>1</sup> A copy of the Order is attached hereto as Exhibit A.

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The Indictment in this case was unsealed on November 4, 2003. On that same day, this Court held its initial appearance and arraignment. During those proceedings, an order setting out the initial conditions for Mr. Scrushy's release was entered. Since that time, Mr. Scrushy has steadfastly complied with all of the conditions of his pre-trial release. Despite travel (authorized by the court) to New York, Washington D.C. and Florida, all of which have ready access to the coast, including trips by private plane, he has done nothing to suggest that he would flee or that he presents a danger to the community. To the contrary, he has consistently demonstrated a commitment to fight the charges pending against him and to clear his name. He has retained counsel, has been active in reviewing documents and video and audio recordings in furtherance of his defense, and now hosts a daily television program.

With six months of exemplary conduct in hand, Mr. Scrushy filed a motion before Magistrate Judge Putnam seeking a minor modification to the terms of his release -- permission to travel to Mobile and Baldwin counties, as he is able to do throughout the rest of Alabama, without the need to make further requests to the Probation Office or the court.<sup>2</sup> In connection with this motion, Mr. Scrushy demonstrated that access to these counties would allow him to manage his real estate development business which includes sites under development in Baldwin County, and to spend time with his children during their school recesses at recreational locations in Mobile County. The opportunities to do these events often arise without notice or the ability to make plans in advance.

To this formidable record, the Government submitted a feeble response, arguing only that Mr. Scrushy's compliance with the terms of his release meant only that the conditions were

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<sup>2</sup> Copies of the briefs filed by Mr. Scrushy and the Government in connection with this motion are attached hereto as Exhibits B, C and D. The transcript of the oral argument before Magistrate Putnam will be filed and supplied to the Court once it is completed.

working. But, of course, these conditions are working only because of the cooperation of the defendant and his desire to defend himself against the charges in the Indictment. He is not on such a short leash that the conditions are compelling him to stay. The Government further argued that, the closer Mr. Scrushy came to trial, the greater the risk that he would flee. This contention was not supported by any case citation, any study, or any reference to the actual record of this case. In fact, it was nothing more than a red herring, completely contrary to the anecdotal evidence available in white collar cases. Once the initial shock of charges dissipates and once a defendant is as actively engaged as Mr. Scrushy has been, that person is more likely to go to trial than to flee.

Finally, the government claimed that the judgment against Mr. Scrushy in Delaware would make him a flight risk. This argument is complete nonsense. That judgment has been outstanding for months and Mr. Scrushy has stayed and complied. [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] The timing of the satisfaction of the Delaware Judgment would only be accelerated by Mr. Scrushy's flight. Thus, Mr. Scrushy has more incentive to stay and defend himself to be able to then address the Delaware judgment than to flee and give up the protection from the judgment he fought so hard to obtain.

In response to Mr. Scrushy's motion (and in the face of the Government's flimsy opposition), Magistrate Judge Putnam issued a two sentence denial with no consideration and no explanation. This decision is not supported by the record on any account and necessitates this appeal.

The present request is very modest in light of Mr. Scrushy's compliance with this Court's orders and with the directions of the Probation Office. He, therefore, asks that this Court reverse the Order and grant his motion to extend his authorized travel within the State of Alabama to include Baldwin and Mobile Counties.

### **ARGUMENT**

This objection to and appeal from Magistrate Judge Putnam's Order is submitted pursuant to 18 U.S.C. § 3145 and United States v. Brown, 342 F.3d 1245, 1246 (11<sup>th</sup> Cir. 2003)(appeals from a magistrate judge must first be made to the district court), citing, United States v. Renfro, 620 F.2d 497, 500 (5<sup>th</sup> Cir. 1980). See United States v. Torres, 86 F.3d 1029 (11<sup>th</sup> Cir. 1996); United States v. King, 849 F.2d 485 (11<sup>th</sup> Cir. 1998). When considering an objection to a magistrate judge's denial of a motion to modify the defendant's conditions of release, the district court conducts a *de novo* review and "starts from scratch." United States v. Torres, 929 F.2d 291, 292 (7<sup>th</sup> Cir. 1991). See also United States v. Hurtado, 779 F.2d 1467, 1481 (11<sup>th</sup> Cir. 1985) (citing United States v. Thibodeaux, 663 F.2d 520 (5<sup>th</sup> Cir. 1981)) (district court is as unfettered in the review of a magistrate's decision as it would be if it were considering whether to amend its own action). Such a review will demonstrate that the Order is unsupported by fact or law. In this case, such a review and the relief requested is warranted because of the strength of the record and lack of any reasoned argument or decision against the request.

It is well settled that courts must endeavor to impose the least restrictive bail conditions that will assure both the defendant's appearance at trial as well as the safety of the community. See 18 U.S.C. § 3142(c); Brown v. United States, 392 F.2d 189 (5<sup>th</sup> Cir. 1968); United States v. Himler, 797 F.2d 156 (3<sup>d</sup> Cir. 1986). The terms of release should not be fashioned in order

to “enrich the government or punish the defendant.” United States v. Rose, 791 F.2d 1477, 1480 (11th Cir. 1986) (quoting United States v. Powell, 639 F.2d 224, 225 (5th Cir. 1981)). Subsection (g) of the statute identifies the factors a court should consider in determining whether proposed modifications to conditions of release can be made while still ensuring the defendant’s appearance and safeguarding the community. See, e.g., United States v. Malloy, 11 F.Supp.2d 583 (D.N.J. 1998). These factors include: (1) the nature and circumstances of the offense; (2) the weight of the evidence against the defendant; (3) the nature and seriousness of the danger posed by the defendant’s release; and (4) the history and characteristics of the defendant, such as community and family ties, employment record, history of alcohol or drug abuse, criminal history, and whether the defendant was on probation or parole at the time of the offense. 18 U.S.C. § 3142(c).

At the beginning of the case, Mr. Scrushy was able to show that his ties to the community and his entire background weighed in favor of release with some conditions. Over the past six months, he has demonstrated that, far from being a risk of flight, he is dedicated to defending the charges and clearing his name. In response, the Government failed to demonstrate that any of these factors now weigh against permitting Defendant to travel more freely to Mobile and Baldwin counties. And Magistrate Judge Putnam’s two sentence Order does not indicate that he considered any of these factors, let alone that he weighed these factors and concluded that the proposed modifications to the terms of Defendant’s release would increase the risk that the Defendant would fail to appear for trial or would somehow jeopardize public safety. To the contrary, such a conclusion is belied by Defendant’s conduct both prior to and since the unsealing of the indictment against him.

As this Court is aware, Mr. Scrushy has been an extraordinarily successful businessman and generous philanthropist in this community for decades. He has a pregnant wife and eight children, an aging father and numerous friends and supporters in Birmingham. He manages a real estate development business in Alabama and hosts a daily television program. And while reckless members of the government and the media have accused him of much, he has never been accused of any behavior (e.g., drugs, guns, violence) that can be said to pose a safety threat to the community. As he is no longer working at a public company, even his ongoing businesses cannot be said to invoke those aspects of the rules for condition of release.

The most persuasive reason why modifying the conditions to Mr. Scrushy's release so as to allow him to travel more freely to Mobile and Baldwin counties is that he has been permitted to travel in the past -- without any restraints whatsoever during the period between the FBI raid in March 2003 and the November 2003 indictment (which he knew was imminent), and to New York, Washington D.C. and Florida since -- and has always returned without incident. To suggest that Mr. Scrushy is more likely to flee the country because of access to Mobile than he was when he traveled to big cities with millions of inhabitants, several international airports and massive ports is absurd on its face. The access to the coast from these two counties is no greater than the access he had when he has been in New York or Florida. Moreover, the idea that he is more of a risk to escape via the Gulf of Mexico from Mobile than across the Florida panhandle (to which he has immediate and constant access under the present conditions of release) is completely illogical.

Moreover, if Mr. Scrushy did seek to flee the jurisdiction rather than face trial (a proposition that defies logic in light of his aggressive defense of this case and demonstrated desire to clear his name) he would forfeit all of his assets. Under the "fugitive disentitlement"

provision added to 28 U.S.C. § 2466 as part of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA) the Government would be able to file a parallel civil proceeding resulting in forfeiture not only of the \$10 million bond securing his bail but the totality of his estate --

**[REDACTED]** <sup>3</sup>

The conditions of release recently imposed on another high profile corporate executive facing fraud charges are instructive. In United States v. Bernard Ebbers, No. S2 02 CR 1144 (BSJ), the court allowed the defendant unfettered travel within his entire home state, Mississippi, including the portion of the state with access to the Gulf of Mexico. These terms of release were permitted at the inception of the case, *i.e.*, where, unlike here, there was no track record as to the defendant's compliance or manifestations of the defendant's commitment to defend himself in the case. Surely, Mr. Scrushy's conduct to date warrants that he be given the same freedom as another corporate executive -- facing similar charges, with similar

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<sup>3</sup> That section provides:

(a) A judicial officer may disallow a person from using the resources of the courts of the United States in furtherance of a claim in any related civil forfeiture action or a claim in third party proceedings in any related criminal forfeiture action upon a finding that such person--

(1) after notice or knowledge of the fact that a warrant or process has been issued for his apprehension, in order to avoid criminal prosecution—

(A) purposely leaves the jurisdiction of the United States;

(B) declines to enter or reenter the United States to submit to its jurisdiction; or

(C) otherwise evades the jurisdiction of the court in which a criminal case is pending against the person; and

(2) is not confined or held in custody in any other jurisdiction for commission of criminal conduct in that jurisdiction.

Title 28, United States Code § 2466.

resources -- who did not have the benefit of six months of exemplary behavior on his balance sheet.

The rationale for this modest request and the unreasonableness of the government's knee-jerk opposition, and the mystery of Judge Putnam's two line decision are made clearer by statements made at the hearing. The government conceded that it had no problem with Mr. Scrushy going to these two counties for business or to vacation with his family. They acknowledged that he could seek frequent trips to do this and they would not oppose. So, the only issue is putting Mr. Scrushy and the Probation Office to the burden of having to plan in advance and then respond to these requests, rather than to approve this travel as he is allowed access to the rest of the State.

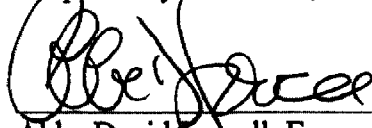
In short, neither the Government nor Magistrate Judge Putnam has articulated any good faith basis for denial of Mr. Scrushy's motion to modify the conditions of release. Accordingly, the Order should be reversed and Mr. Scrushy's motion granted.

### CONCLUSION

For all the foregoing reasons, Magistrate Judge Putnam's May 12, 2004 decision should be reversed and Defendant's Motion should be granted.

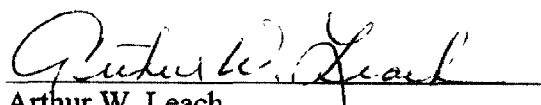
Dated: May 24, 2004

Respectfully submitted,



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